



U.S. Department of Justice

Environment and Natural Resources Division

90-11-2-1045/3

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July 8, 2011

CONFIDENTIAL SETTLEMENT COMMUNICATION

Via E-Mail and First-Class Mail

Linda E. Benfield
FOLEY & LARDNER LLP
777 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: United States, et al. v. NCR Corp., et al., Case No. 08-C-0895 (E.D. Wis.)

Dear Linda:

The United States' case team for this matter has reviewed the available, relevant information relating to Kimberly-Clark Corporation's potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA") for polychlorinated biphenyl ("PCB") contamination at the Lower Fox River and Green Bay Site (the "Site"). Based on that review, I am prepared to recommend that the United States enter into a *de minimis* settlement with Kimberly-Clark pursuant to CERCLA Section 122(g), 42 U.S.C. § 9622(g), on the terms outlined in this letter.^{1/} I would recommend that the United States enter into a *de minimis* settlement with Kimberly-Clark in exchange for a payment of **\$1,524,000**.^{2/} That amount would include \$1,280,160 for past and future response

^{1/} Although I am willing to recommend a settlement on these terms, any final settlement would need to be approved by authorized officials with the United States Department of Justice and other federal agencies, including the United States Environmental Protection Agency. In formulating this settlement proposal, I have coordinated with the State of Wisconsin and representatives of the members of the Lower Fox River/Green Bay Natural Resource Trustee Council, but those other government parties would ultimately need to make independent decisions about whether to join in any final settlement. Finally, as explained below, the terms of any final settlement would be memorialized in a proposed consent decree that would be subject to public comment and court approval.

^{2/} To minimize uncertainty for all parties benefit, we would ask that the full settlement amount be deposited in an interest-bearing escrow account or in the District Court's Court Registry Account

costs and \$243,840 for natural resource damages. This settlement proposal reflects our current view that Kimberly-Clark may bear no greater than a 0.1016% share of liability for PCB contamination at the Site, and our assumption that the total site costs and damages may amount to \$1.5 billion.

The proposed settlement amount reflects a blended assessment of two models utilizing different feedstock assumptions. Kimberly-Clark's Lakeview and Badger Globe mills used significant quantities of secondary fiber as furnish, approaching 50% of total furnish in certain years.^{3/} In its responses to the Department of the Interior's CERCLA Section 104(e) information requests, Kimberly-Clark identified its historic use of "secondary fiber," but did not distinguish among sub-categories of secondary fiber. The governments' initial model ("Model 1") utilizes the assumption that Kimberly-Clark's secondary fiber usage consisted of "mixed wastepaper" and that mixed wastepaper would have included some NCR Paper converter trim coated with PCBs. Model 1 generates a volumetric share for Kimberly-Clark of 0.8% of total PCBs discharged to the Lower Fox River from papermaking activities. In response to supplemental information provided by Kimberly-Clark, the governments generated a second model ("Model 2") using the assumption that Kimberly-Clark's secondary fiber usage did not consist of mixed wastepaper, but rather a variety of other feedstocks (boxboard clippings, corrugates, etc.) that would not have contained NCR Paper converter trim. Model 2 generates a volumetric share for Kimberly-Clark of 0.024%.

For purposes of settlement, the United States has blended the two models; weighing Model 1 as 10% and Model 2 as 90% generates a blended share of 0.1016%. The United States believes this is an appropriate compromise evaluation of Kimberly-Clark's potential PCB releases to the River. While Kimberly-Clark has provided a significant quantity of purchasing data supporting its assertions regarding the make-up of its secondary fiber purchases, this information is incomplete and does not address the peak years of NCR Paper production. Kimberly-Clark has provided testimony that operational changes were necessitated before it could begin using de-inked pulp in the early 1970s and that inks in NCR Paper converter trim would have rendered it an unusable feedstock for tissue production. While positive findings for PCBs are present in certain historic sampling results, the quantities are not inconsistent with the blended model approach.

A consent decree with Kimberly-Clark would closely-track the settlements between the governments and *de minimis* parties in United States, et al. v. George A. Whiting Paper Co., et al.

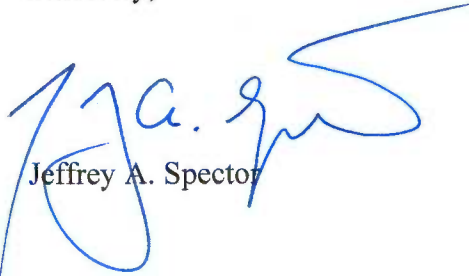
within ten days of lodging of the consent decree. The settlement amount and accrued interest would be paid to the government after the consent decree has been approved and entered by the Court -- or, if the public comment process were to result in withdrawal or disapproval of the consent decree, would be redistributed to Kimberly-Clark.

^{3/} Use of significant quantities of secondary fibers as a feedstock distinguishes Kimberly-Clark's operations from those of Proctor & Gamble, which used virgin fiber exclusively in its tissue production operations for much of the relevant time-period.

Case No. 1:09-cv-00692 (E.D. Wis.) (Dkt. 12-1 and 16-1), which themselves were substantially similar to the United States' *Model CERCLA Section 122(g)(4) De Minimis Contributor Consent Decree* (<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/demin-cd-122g4-mod-2003.pdf>). The volumetric reopener for Kimberly-Clark would be information indicating that Kimberly-Clark was responsible for releasing more than 250 kg of PCBs at the Site. In addition to resolving the governments' CERCLA claims for the Site, the consent decree would afford Kimberly-Clark statutory protection against claims for contribution by other potentially responsible parties as provided by CERCLA Section 113(f), 42 U.S.C. § 9613(f).

Please contact me at (202) 514-4432 with any questions you may have regarding the above.

Sincerely,



Jeffrey A. Spector

cc: Randall Stone – U.S. DOJ (via e-mail)
Cynthia Hirsch – Wisconsin DOJ (via e-mail)
Richard Murawski – EPA Region 5 (via e-mail)
Douglas Dixon and Melissa Gibbons – EPA OECA (via e-mail)
John Carlucci and John Rudolph – DOI (via e-mail)
James Bittorf – Oneida Tribe (via e-mail)
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